No: 342

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

BLAZEY CZAPLICKI,

Petitioner,

—v.—

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On the Petition

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, BLAZEY CZAPLICKI, prays that a writ of certiorari issue to review the judgment and decree of the United State Court of Appeals for the Second Circuit and the denial of his petition to the said court for rehearing.

The Opinions of the Courts Below

(1) The opinion of Hon. Sidney Sugarman, *U.S.D.J.*, on the exceptions and exceptive allegations of respondent Kerr Steamship Company to the libel of Blazey Czaplicki starts at page 1a of the appendix to this petition. It is reported in *Czaplicki v. The Hoegh Silvercloud*, 110 F. Supp. 933; 1953 A. M. C. 206 (D. C. S. D. N. Y. 1952).

(2) The opinion of Hon. Henry W. Goddard, *U.S.D.J.*, on the motion of libelant to strike the fifth separate defense in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.; and to add Travelers Insurance Company as a party or to order Travelers to assign the cause of action for injuries suffered by libelant to libelant starts at page 6a of the appendix to this petition. Petitioner's attorney has not found this opinion reported anywhere as yet.

(3) The oral determination of Hon. Sylvester J. Ryan, *U.S.D.J.*, dismissing the libel of petitioner appears at page 14a of the appendix to this petition. This opinion is not reported.

(4) The opinion of Hon. Jerome N. Frank, *U.S.C.J.*, affirming the decrees below appears at page 16a of the appendix to this petition. Petitioner's attorney has not found this opinion reported anywhere as yet.

Jurisdiction

(1) On May 23, 1955, the judgment and decree of affirmance of the United States Court of Appeals for the Second Circuit was made and entered.

(2) On June 14, 1955, an order denying petitioner's petition for a rehearing was made and entered.

(3) Jurisdiction to review the judgment and decree of affirmance by writ of certiorari is found in 28 U. S. Code, Sections 1254(1) and 2101(c).

Questions Presented for Review

1. Whether or not a Court of Appeals decided an admiralty case properly on the defense of laches, where the issue was not passed upon by the judges of the District Court who ruled on various facets of the case and no hearing was had on the issue?

2. Whether or not a longshoreman is barred from maintaining an action in admiralty against third parties by the provisions of 33 U. S. C. §933 relating to the statutory assignment of his cause of action to his employer's insurance carrier, where he is forced to file a claim petition shortly after his accident and while he is still incapacitated and his employer's insurance carrier controverts his claim for the purpose of forcing him to elect between compensation and his third-party recovery, it appearing without the knowledge of the longshoreman, that the employer's insurance carrier is also the liability carrier for the third party primarily responsible for the accident?

3. Whether or not a court of admiralty, applying equitable principles can reassign a cause of action to a longshoreman where it appears that the employer's insurance carrier, because it insures the third party primarily responsible, is unable to prosecute the joint interest it has in trust in the third party cause of action?

4. What are the characteristics required of an "award" under 33 U. S. C. §933 to make it operate as a statutory assignment of a third-party cause of action?

Statutes Involved

33 U. S. C. A. 933(b)

"933. Compensation for injuries where third persons are liable. * * *

(b). Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."

* * * * *

33 U. S. C. A. 919

"919. Procedure in respect of claims. (a) Subject to the provisions of section 913 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of

any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee."

Statement of the Case

This case involves an affirmance on an appeal of the order and decrees of three judges of the District Court. Petitioner instituted the present action by a libel in two counts, one for negligence and one for unseaworthiness.

On September 6, 1945, the libelant, while employed as a longshoreman by Northern Dock at Pier 3, Hoboken,

New Jersey was injured on board the SS HOEGH SILVERCLOUD.

The libelant was injured when he fell from steps made by the Hamilton Marine Contracting Company, which steps had not been secured. This company was insured for liability by the same Travelers Insurance Company which insured his employer for compensation. Libelant alleges that on September 6, 1945, he was employed as a longshoreman by Northern Dock at Pier 3, Hoboken, and was loading the SS HOEGH SILVERCLOUD. During lunch hour the carpenters had built steps which were to be fastened to the catwalk. While walking over these steps they collapsed and he fell and injured himself. The steps were not fastened or secured by the carpenters and were carried away when he stepped on them. The carpenters were not connected with his employer, but were working for a separate carpenter company, the Hamilton Marine Contracting Company.

The libelant in his affidavit filed in this action stated that he injured his left side, left thigh, left elbow, right leg, and left testicle in this accident. After the compensation carrier's doctor completed treatment and refused to treat him any more he went to other doctors and in August of 1946 his left testicle was removed. He states he has not worked since (Record pp. 60-63).

The records of the compensation commission show that libelant had filed a claim dated September 27, 1954, that an "award" was made on September 28, 1945, that the report of the employer dated September 6, 1945, described the accident: "Man was ascending steps to get over catwalk to #1 hatch. Steps were not fastened and they carried away—man fell and bruised right leg and left thigh."

A notice that the claim would be controverted was filed on September 17, 1945, on behalf of the insurance carrier

for the reason that the claimant was "undecided whether or not to sue the third party." A memorandum by the claims examiner states that compensation payments were withheld by the carrier "because of the possibility of the injury having been caused by the negligence of a third party" (Lib. Exh. 4; Resp. Exh. 1).

The deposition of Travelers Insurance Company disclosed that in their file in answer to the question "Is the right of subrogation involved?" the answer of "yes" is given (Lib. Exh. 7 at p. 7). It also appears from their file that claimant appeared at the insurance company office on September 17, 1945, that he was undecided as to whether he should sue or accept compensation, that he spoke a "broken English," that Hamilton Marine Company and Kerr Steamship Lines were the parties against whom a "subrogation" claim might be asserted.

In the unsigned statement of libelant in the Travelers file appears the following:

> "I do not know now whether I want compensation or whether I should sue the other company. If I come around all right and don't have any trouble later on I don't want to bother to sue anybody" (Lib. Exh. 7 at p. 10).

Libelant filed this suit to recover damages for his injuries against the vessel and against Hamilton Marine, the employers of the carpenters.

In the answer filed by Hamilton Marine in its Fifth Defense, it sets forth that libelant was an employee of Northern Dock who carried compensation insurance with the Travelers Insurance Company and that on September 28, 1945, a formal award was entered by the Deputy Commissioner which operated as an assignment to the Travelers Insurance Company of all rights of libelant to recover against third parties (Record pp. 34-39).

On December 30, 1952, the Hon. Sidney Sugarman ordered, adjudged and decreed that this libel be dismissed as to the respondent, Kerr Steamship Company, Inc., on the ground that libelant is an improper party because he accepted compensation under formal award issued under title 33 U. S. C. §933(b) (p. 3a). The present appeal includes an appeal from said decree.

The other respondents, SS HOEGH SILVERCLOUD, Oivind Lorentzen as Director of Shipping and Curator of The Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, have not filed answers.

Section 33(b) of the Longshoremen's & Harbor Workers' Compensation Act by its assignment provision, as construed by Judge Sugarman, made the said Travelers Insurance Company, in effect, the trustee of the cause of action in which libelant and the said Travelers Insurance Company jointly had an interest.

Because of the conflict of interest of the effective trustee of this action, the libelant appealed to the traditional powers of the court to protect his rights and to do justice, and he made application to dismiss the Fifth Separate Defense in the answer filed by respondent, Hamilton Marine, who are insured by Travelers Insurance Co. on the ground that the true party in interest cannot take advantage of its own default in failing to sue as trustee of the cause of action (Record pp. 84-92).

Furthermore, libelant made application to the court to make the Travelers Insurance Co. a party to this action and to compel Travelers Insurance Co. to sue in its own behalf and as trustee for libelant for the cause of action for the injuries sustained by libelant or for an order requiring Travelers Insurance Co. to reassign said cause of

action to the libelant because of conflict of interests, and to do justice to the libelant herein. . .

Judge Goddard denied this motion, holding that the statutory assignment was absolute in the absence of fraud (p. 11a).

The case then came on to be heard by Judge Ryan who limited the hearing to and dealt solely with the defense of statutory assignment. Judge Ryan decided the case on the ground that the law of the case had been settled by the two opinions rendered heretofore, and he dismissed the libel as to all remaining parties (p. 30a).

Libelant appealed from all rulings.

On appeal the Court of Appeals discussed the question of the statutory assignment under 33 U. S. C. §933 which was the only ground considered by the courts below and indicated that it did not agree with the determination on this issue, but stated that the case didn't have to be decided on this issue because the libelant was barred by laches. This latter ground had not been developed in the District Court.

Libelant petitioned for a rehearing, but the petition was denied. Libelant now seeks to appeal from the judgment and order of the United States Court of Appeals for the Second Circuit.

Reasons for Allowance of the Writ

This case presents several issues of importance which have wide application in the field of maritime law. Petitioner believes that the decisions below are not in consonance with the decisions of this Court. Important questions of federal law, statutory and maritime, are involved, which should be settled by this Court.

The assignment provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et seq.* (hereinafter referred to as LHWCA) as construed by the District Court is harsh and not in keeping with the liberal intent of Congress and the exercise of the broad equitable powers of the Admiralty Court.

The United States Circuit Court of Appeals, in deciding the appeal on the issue of laches, which issue was never reached and decided in the District Court, deprived the libelant of an opportunity to litigate this issue and departed from the accepted and usual course of judicial proceedings.

Judge Sugarman decided the exceptive allegations of respondent Kerr Steamship Company solely on the ground that libelant's cause of action had been assigned. Judge Sugarman specifically stated (p. 3a):

> "No consideration is given the exception based on laches."

Judge Goddard in deciding on petitioner's motion to strike the defense of statutory assignment in the answer filed by Hamilton Marine Contracting Co., Inc. and to add Travelers Insurance Company as a party or to order Travelers Insurance Company to assign the cause of action back to libelant, did not deal with the issue of laches (p. 6a).

Judge Ryan, who limited the hearing of the case to this issue raised by the statutory assignment defense, decided the case solely on the ground that the law of the case had been settled by the opinions of his brother judges (p. 14a).

None of the judges on the trial court level decided the various issues before them on the ground that libelant had lost his rights because of laches. The Court of Appeals, however, did not decide the case on the issues held by the District Court to be determinative, but instead disposed

of the appeal on the ground of laches. Judge Frank stated (p. 20a):

> "We do not, however, need to decide this issue; for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovery from the third party. Whether the statute of limitations of New Jersey, where the libelant resides and where the accident occurred or the statute of limitations of New York, where suit was brought, is our guide the time has long since passed when the assignee might have recovered against the alleged tortfeasor."

The accident in the present case occurred on September 6, 1945. The libel in the present case was filed on June 12, 1952, or six years and 9 months later. The action was based both on grounds of negligence and unseaworthiness. Under the doctrine of *LeGate* v. *The Panamolga*, 221 F. 2d 689 (2 Cir. 1955), reference would be made to the New York six year limitation provision because it included a cause of action based on unseaworthiness. Compare N. J. S. A. 2A:14-1 which is the New Jersey six year statute.

The libelant had filed affidavits on the motions made in the District Court to explain the delay. At the trial no testimony was taken on this issue, as the court only considered the defense of statutory assignment.

The libelant has not had a hearing on the issue of laches. Nor has he been given an opportunity to amend his pleadings, if such amendment is necessary, or to prove facts which would negative laches. See *Taylor* v. *Grain*, 195 F. 2d 163, 165 (3 Cir. 1952); *Redman* v. *United States*, 176 F. 2d 713 (2 Cir. 1949); *Hughes* v. *Roosevelt*, 107 F. 2d 901 (2 Cir. 1939); *The Sydfold*, 86 F. 2d 611 (2 Cir. 1936).

When the opinion of the Court of Appeals was received the petitioner applied for a rehearing but his appli-

cation was denied (p. 23a). The issue of laches is an issue of fact as well as law. Under the circumstances the court should have remanded the case to the District Court for the District Court to make findings on the issue. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88, 63 S. Ct. 454, 459, 89 L. Ed. 626 (1943).

In *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 72 S. Ct. 12, 96 L. Ed. 31 (1951), this Court stated at page 30:

> "Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. * * * "

It would appear from the opinion of the Court of Appeals that consideration was given only to the applicable statute of limitations which was automatically applied and no consideration was given to the equities of the parties.

The Court of Appeals did not follow the District Court in holding that libelant had lost his rights because of a statutory assignment. Judge Frank stated (p. 19a):

> "* * * Libelant argues that, because of this financial interest in the potential recovery from the third person, he is, in effect, a beneficiary, and the assignee is, in effect, a trustee who holds a right in action in trust for the injured party. He cites the following words of Judge Learned Hand, written in respect of the statute as to compromises between assignee and tortfeasor: '* * * although it is true that, by accept-

ing compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest.' United States Fidelity & Guaranty Co. v. United States, 152 F. (2d) 46, 48 (C. A. 2).

The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party. * * * "

Courts of admiralty apply broad equitable principles to better attain justice in cases within their jurisdiction. *United Fruit Co.* v. *United States*, 186 F. 2d 890, 896 (1 Cir. 1951); *The Kongo*, 155 F. 2d 492, 495 (6 Cir. 1946), cert. den. 329 U. S. 735, 67 S. Ct. 99, 91 L. Ed. 635 (1946); *Gardiner* v. *Dantzler Lumber & Export Co.*, 98 F. 2d 478, 479 (5 Cir. 1938). Cf. *Criston* v. *United States*, 8 F. R. D. 327 (D. C. E. D. Penna. 1947). Since a species of trust relationship existed between the libelant and the insurance carrier for the third party primarily responsible it would be inequitable for that insurance carrier, through its insured to claim the advantage of its own failure to prosecute the cause of action which had been assigned to it by operation of law.

This case involves a very important question relating to the statutory assignment provisions of the LHWCA, 33 U. S. C. §933. Both Judge Goddard in his opinion (p. 8a) and Judge Frank in his opinion (p. 19a) refer to

Hunt v. *Bank Line*, 35 F. 2d 136 (4 Cir. 1929). This case is an early one under the LHWCA. Libelant believes that this case does not state good law and that the matter should be considered and clearly defined by this Court.

This Court has indicated that the question presented in that case is still an open one. In *Aetna Life Ins. Co.* v. *Moses*, 287 U. S. 530, 53 S. Ct. 231, 77 L. Ed. 477 (1933), the plaintiff was the employer's compensation carrier who had paid the employee's widow under an award. The carrier then sued in its own right and also to the use of widow in her own right and as administratrix. Chief Justice Stone, speaking for the court, stated at page 543:

> "Accordingly the employer is the party to bring the action and the only necessary party plaintiff in case before us. But the insurance company and the widow, both in her own right and as administratrix, are interested in the recovery. Under the common-law practice, the defendant may not complain if the employer indicates their beneficial interests by bringing the action to their use as well as to his own. * * * Whether, under Equity Rule 13 of the Supreme Court of the District of Columbia, made applicable to actions at law by the first paragraph of the law rules, they may join with him as legal plaintiffs since they have 'an interest * * * in obtaining the relief demanded' we do not decide. * * * Nor do we consider what would be the rights of the person entitled to compensation or the personal representative, compare Hunt v. Bank Line (C. C. A.), 35 F. (2d) 136; or the insurer * * * in a case where the employer refused to co-operate in the prosecution of the action."

The opinion in the *Hunt* case rejects the trust theory of the assignment provisions of the LHWCA approved by

Judge Hand in 1945 in *United States Fidelity and Guaranty Co.* v. *United States*, 152 F. 2d 46 (2 Cir. 1945).

The *Hunt* case was decided before the amendment to Section 933 which clarified the intent of Congress not to make the rights of an injured employee under the LHWCA and his rights against third parties mutually exclusive.

The theory advanced in the *Hunt* case that the employee in accepting compensation, in effect, chose between a remedy against one of 2 joint-tortfeasors is not analogous. The remedy of the employee under the LHWCA is not based on wrongdoing. It arises from the employer-employee contractual relationship. The employee's benefits under the act are generally much less than the damages given in regular tort actions. See *Crab Orchard Imp. Co.* v. *Chesapeake and Ohio Ry. Co.*, 115 F. 2d 277 (4 Cir. 1940), cert. den. 312 U. S. 702, 61 S. Ct. 807, 85 L. Ed. 1135 (1941).

Furthermore, the *Hunt* case disregards the liberal intent of the LHWCA repeatedly announced by this Court. See *American Stevedores* v. *Porello*, 330 U. S. 446, 67 S. Ct. 847, 91 L. Ed. 1011 (1947); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); *Doleman* v. *Levine*, 295 U. S. 221, 55 S. Ct. 741, 79 L. Ed. 1402 (1935); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408, 52 S. Ct. 187, 76 L. Ed. 366 (1932).

Petitioner also raised the question of what is an "award" within the meaning of the assignment provisions of 33 U. S. C. 933. Prior to 1938, before this section was amended, the mere acceptance of compensation operated as an assignment of the employee's cause of action. See *Grasso* v. *Lorentzen*, 56 F. Supp. 51 (D. C. S. D. N. Y. 1944), 149 F. 2d 127 (2 Cir. 1945), cert. den. 326 U. S. 743, 66 S. Ct. 57, 90 L. Ed. 444 (1945).

Because this case presents important questions on matters of law and procedure this Court should grant petitioner's request.

Wherefore petitioner prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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On the Petition

APPENDIX

Opinion of Hon. Sidney Sugarman, *U.S.D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On exceptions and exceptive allegations of respondent Kerr Steamship Company to the libel of Blazey Czaplicki.

Libelant was injured on September 6, 1945 while going aboard the S.S. Hoegh Silvercloud in the performance of his duties as a longshoreman employed by the Northern Dock Company.

He was advised (by letter dated September 25, 1945 from D. B. O'Keeffe, Claims Examiner in the office of the Compensation Commission) of his right to sue a third party and of the effect of acceptance of compensation under an award, namely, the assignment to his employer of any cause of action to recover damages from a third party.

Thereafter D. B. O'Keeffe incorporated in the Commission's file a report stating—

> "The claimant called on September 27, 1945, and the provisions of Section 33(b) of the Act were explained to him. He stated very definitely that he desired to receive his compensation and to waive any rights to the third party action, and that he did not desire to consult an attorney in the matter.
>
> He filed a Claim for Compensation and a formal order will be issued accordingly."

Libelant's claim having been duly filed, a formal order and award was made in the proceeding by a Deputy Com-

missioner. Under this award, libelant received a total of $160.72 at the rate of $22.50 per week for disability ending December 25, 1945.

Notwithstanding, on April 30, 1946, this libelant commenced a third party suit against respondent Kerr Steamship Company, Inc., in New Jersey in the Hudson County Court of Common Pleas to recover damages for his injuries. This suit was dismissed on November 22, 1946 for improper service of process on Kerr Steamship Company. A second suit to recover for libelant's injuries was then commenced and later voluntarily discontinued.[1]

By October 4, 1948, libelant had retained his present counsel, but the libel herein was not filed until June 12, 1952.

The exceptions and exceptive allegations of respondent Kerr Steamship Company, Inc., were brought on to be heard on the grounds (1) libelant is barred from commencing this action because he has elected to receive and did receive compensation under an award in a compensation order filed by the Deputy Commissioner, and (2) libelant is barred from commencing this action because of laches.

Libelant meets the first exception with the challenge that the Deputy Commissioner's award, made without a hearing, constituted no more than a memorandum and is not "an award in a compensation order filed by the deputy commissioner", the acceptance of compensation under which operated as an assignment of his claim to his employer.

I disagree. Under the procedure in respect of claims set up by the statute[2] if no hearing is demanded by an inter-

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1 Respondent's brief alleges this suit was commenced in Supreme Court, New York County, and was discontinued November 26, 1947. Libelant asserts it was both commenced and discontinued without his consent.

2 33 U. S. C. A. 933b.

3 33 U. S. C. A. 919(c).

ested party the Deputy Commissioner need not order one and may proceed to an order either rejecting the claim or making an award.

Libelant did more than fail to request a hearing. He called at the Commission, specifically waived his rights to sue a third party, elected to take compensation and declined to consult an attorney. In the face of O'Keeffe's categorical statement of what transpired on September 27, 1945 docketed in the Commission's file the next day, I cannot accept libelant's statement (in his answering affidavit of October 28, 1952) more than seven years later that he didn't understand what O'Keeffe told him, as a basis for upsetting the finality of the Deputy Commissioner's award.

Accordingly the exception and exceptive allegation that libelant is barred for having "elected and received a Formal Compensation Award and benefits under Title 33 U. S. C. 901 et seq:" is sustained.

No consideration is given the exception based on laches.

Libel dismissed.

Dated: December 11, 1952
New York, New York

SIDNEY SUGARMAN
United States District Judge

Order and Final Decree

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Respondent Kerr Steamship Company, Inc., having made a motion for an order sustaining its exceptions to the libel herein on the grounds (1) that libelant is an improper party, libelant having accepted compensation under a formal compensation award issued under Title 33 U. S. C. 933(b), and (2) libelant's laches, and the said motion having duly come on to be heard before the Honorable Sidney Sugarman on the 30th day of October, 1952, and Haight, Deming, Gardner, Poor & Havens, by Francis X. Byrn, Esq., of counsel, having appeared in support of said motion, and Nathan Baker, by Bernard Chazen, Esq., of counsel, having appeared in opposition thereto, and having been argued and submitted, and the Court, after due deliberation, having rendered its decision contained in a written memorandum opinion sustaining respondent Kerr Steamship Company, Inc.'s exceptions to the libel on the first ground above, and for that reason not considering the exceptions based upon the question of laches:

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent Kerr Steamship Company, Inc., it is

ORDERED that respondent Kerr Steamship Company, Inc.'s exceptions to the libel based upon the existence of a formal compensation award within the meaning of Title 33 U. S. C.

933 (b), be and the same are in all respects sustained, and it is further

ORDERED, ADJUDGED AND DECREED that the libel herein be and the same hereby is dismissed as to respondent Kerr Steamship Company, Inc.

SIDNEY SUGARMAN
U.S.D.J.

At New York, N. Y., in said District, this 30th day of December, 1952.

Opinion of Hon. Henry W. Goddard, *U.S.D.J.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This is a motion by libelant to strike the fifth separate defense in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.; and to add Travelers Insurance Company as a party or to order Travelers to assign the cause of action for injuries suffered by libelant, to libelant.

Libelant filed this suit on June 12, 1952 to recover for injuries allegedly suffered by him, as a longshoreman employed by Northern Dock Company, while loading the S/S Hoegh Silvercloud on September 6, 1945. Libelant alleges that Hamilton negligently failed to fasten a catwalk they constructed and that it collapsed while he was on it, thereby causing his injury.

In July, 1952, one of the respondents, Kerr Steamship Company, excepted to the libel on the ground that libelant had elected to, and did, receive a compensation award under the Longshoremen's and Harborworkers' Compensation Act [33 U. S. C. A. §901-50]. Judge Sugarman, of this district, found that libelant had made such an election and received a compensation award, and any cause of action against a third party was thereby assigned to his employer. The libel was dismissed as to Kerr on December 11, 1952. An appeal from this decision is pending.

Hamilton, in its answer, denies any negligence, alleges contributory negligence and laches and its fifth defense asserts that by virtue of libelant's election, the cause of

action was assigned to his employer, Northern, and of its insurance carrier, Travelers.

Libelant asserts that Travelers is the insurance carrier for both Northern and Hamilton and says that Travelers "has failed or refused to sue the third parties responsible for libelant's injuries as it would in effect be suing itself, being also the insurance carrier for the Hamilton Marine, and thereby failed and breached its obligation as trustee for libelant." Libelant thus seems to assume that he may sue, or require Travelers to sue.

Title 33 U. S. C. A. §933, provides:

"Compensation for injuries where third persons are liable.

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, * * *, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person.*

* * * * *

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise . . . ;

(B) the cost of all benefits actually furnished by him to the employee under Section 907;

(C) all amounts paid as compensation;

(D) . . .

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." [Emphasis added.]

In *Hunt* v. *Bank Line*, 35 F. (2nd) 136, C. C. A. 4, 1929 the court passed on this very question. The libelant there argued that where, after the assignment of the cause of action to his employer, it refused to sue the third party because its insurance carrier was also the carrier for the vessel, the employee could bring suit, joining his employer as a party. The court held to the contrary, on the ground that the statute did not allow it. The court stated at 138:

"It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no fur-

ther interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises. *And this is given by the statute, not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury.*" [Emphasis added.]

In *Johnson* v. *American-Hawaiian SS Co.*, 98 F. (2nd) 847, C. C. A. 9, 1938, at 850, the court declared:

> "We think that a sound construction of the act warrants the conclusion that once the employee has made a valid binding election to accept compensation he has no further control over the cause of action against the third person whose negligence cause the injury." Accord, *The Nake Maru*, 101 F. (2nd) 716, C. C. A. 3, 1939, at 717; *Moore* v. *Hechinger*, 127 F. (2nd) 746, C. A. D. C. 1942, at 748.

The Act gives the employee the right to elect between compensation from his employer and a suit against the third party. But he cannot have both. *Moore* v. *Hechinger*, supra, at 748; *Fontana* v. *Penna R. Co.*, 106 F. Supp. 461, 463.

Having made his election to receive the compensation award the libelant has no further rights against Hamilton. *Currant* v. *Eastern SS Lines*, 77 F. Supp. 9, affirmed on the opinion of the district court, 170 F. (2nd) 148, C. C. A. 1, 1948.

However, if Northern, or its insurance carrier, Travelers, had brought suit against Hamilton and recovered an amount in excess of the compensation paid, plus expenses incurred in the suit, Northern, or its insurance carrier, would hold such excess as trustee for the libelant.

It follows that the motion to strike the defense must be denied.

It also follows that libelant's attempt to require Travelers to bring suit must be denied. Under the Act, by the express election of libelant, all rights were assigned to the carrier here. By the specific terms of the Act, the carrier is given control of the litigation, upon assignment. *Calif. Casualty Indemnity Exchange* v. *United States*, 74 F. Supp. 410; *The Aden Maru*, 51 F. (2nd) 599, 600. It is the carrier's right to compromise the employee's claim against third parties as it sees fit. *The Etna*, 138 F. (2nd) 37, C. C. A. 3, 1943, at 40.

The employee is entitled to claim compensation although the accident was due partly or entirely to his own negligence. It is plain that, since the carrier's liability to pay compensation is absolute whereas the possible liability of a third party is grounded on proof of its negligence, there will be many occasions where the carrier may not be able to recover over against the third party. cf. *Loraine* v. *Coastwise Lines*, 86 F. Supp. 336, 339. The Act clearly gives the carrier the freedom, in the absence of fraud, to weigh its chances of recovery and to make its choice to sue or not, accordingly. "The authority on the part of the employer to compromise without instituting suit negatives any right on the part of the employee to have suit instituted. And it is to be noted, also, that the employee is given no power to control or veto the compromise." *Hunt* v. *Bank Line*, supra, at 137.

In *Moore* v. *Hechinger*, supra, the court in holding that an employee was not a proper party plaintiff in a suit against a third party by the insurance carrier, stated at p. 749:

> "Furthermore, reason compels this conclusion, for if the employee is a necessary or proper party, the freedom of action which the statute vests in the employer

in the circumstances we are considering would be lost. He could neither dismiss, settle, nor prosecute over the objection of his co-plaintiffs. His hands would be tied, and the thing which the statute gives him absolutely would be subject to the control of another. Such a result the language of the statute does not warrant."

This reasoning is applicable here. To allow a libelant to step in again, after he has deliberately made his election to accept the award, and to require that suit be brought, would contravene the intent of the statute. To require a carrier to institute suit where in its judgment there may be little or no chance for recovery would be oppressive, and contrary to the Act.

Were there a showing of fraud, the result might be different. cf. *The Kokusai Kisen Kabushiki Kaisha*, 44 F. (2nd) 659; *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. (2nd) 46, C. C. A. 2, 1945, at 48; *Currant* v. *Eastern SS Lines*, supra. The libelant does not charge fraud. In fact his charges fall far short of the usual requirements for pleading fraud. cf. Rule 9(b) F. R. C. P.

The New York cases, under the New York Workmen's Compensation Law, a similar statute, have also held that the statutory assignment is absolute, in the absence of fraud, cf. *Skakandy* v. *New York*, 274 App. Div. 153, affirmed 298 N. Y. 886; *Taylor* v. *New York Central RR.*, 294 N. Y. 397, 402; *Monti* v. *Gimbel Bros.*, 192 Misc. 811, affirmed 275 App. Div. 845.

Motion denied. Settle order on notice.

November 30th, 1953

HENRY W. GODDARD
U.S.D.J.

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A motion by the libelant, Blazey Czaplicki, for an order:

1. Dismissing the Fifth Separate Defense contained in the answer filed by respondent, Hamilton Marine Contracting Company, Inc.
2. To add Travelers Insurance Company as party libelant to sue in its behalf and as trustee for libelant.
3. To make the said Travelers Insurance Company a party to the said action.
4. Requiring Travelers Insurance Company to assign to libelant any cause of action for injuries to libelant which may be vested in the said Travelers Insurance Company.

5. For any other order which the court may deem just, having duly come on for hearing before this court on November 5, 1953, and upon reading and filing the said notice of motion dated October 30, 1953 and the affidavit of Nathan Baker verified October 30, 1953 together with a copy of the memorandum of Sidney Sugarman, United States District Judge, attached thereto and the affidavit of Bernard J. McGlinn verified the 4th day of November, 1953, and after hearing Nathan Baker, proctor for the libelant, in support of said motion and Galli & Locker, by Bernard J. McGlinn, proctors for respondent Hamilton Marine Con-

tracting Company, Inc., in opposition thereto and due deliberation having been had and upon filing the opinion of the court dated November 30, 1953, it is

ORDERED that the said motion is in all respects denied.

HENRY W. GODDARD
U.S.D.J.

Filed Dec. 14, 1953

Final Decree

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

A. 173-113

[SAME TITLE]

This cause having duly come on to be heard on the 20th day of April, 1954, before the Honorable Sylvester J. Ryan, upon the pleadings and proofs, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having heretofore filed exceptions to the libel and complaint on the grounds that said Blazey Czaplicki, is an improper party libelant, as has already been held in this case as to respondent, Kerr Steamship Company, Inc., in an opinion filed December 11, 1952, No. 20212, by the Honorable Sidney Sugarman, and respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, having moved the Court on its exceptions, and respondent Hamilton Marine Contracting Company, Inc., having by answer raised the defense that Blazey Czaplicki is an improper party libelant, relying as well on the aforementioned opinion and decision of the Honorable Sidney Sugarman, and having moved to dismiss the libel and complaint on these grounds, and this matter having been argued and submitted by the proctors for the respective parties, and the Court, after due deliberation having rendered its decision in open court, directing a decree dismissing the libel herein, with prejudice and without costs.

Now, on motion of Haight, Deming, Gardner, Poor & Havens, proctors for respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, it is

ORDERED, ADJUDGED AND DECREED that the libel herein be and the same hereby is dismissed with prejudice and without costs as to respondent, Oivind Lorentzen, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping & Trade Mission, and as to respondent, Hamilton Marine Contracting Company, Inc., on the authority of the opinion and decision of Judge Sugarman, No. 20212, filed December 14, 1952, holding that Blazey Czaplicki was an improper party libelant, having accepted compensation under a formal award and order filed by the Deputy Commissioner within the meaning of Title 33, U. S. C., Sec. 933(b).

Dated at New York, N. Y., in said District this 10th day of May, 1954.

SYLVESTER J. RYAN
U.S.D.J.

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 278—October Term, 1954.

(Argued April 13, 1955 Decided May 23, 1955.)

Docket No. 23429

BLAZEY CZAPLICKI,

Libelant-Appellant,

—v.—

THE VESSEL "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture; OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.,

Respondents.

Before:

CLARK, *Chief Judge*, and
FRANK and HASTIE, *Circuit Judges*.

Appeals from the United States District Court for the Southern District of New York, Judges Sugarman, Goddard and Ryan, presiding.

Libelant Czaplicki appeals from the dismissal of libels against Kerr Steamship Company, Inc., and SS HOEGH SILVERCLOUD and OIVIND LORENTZEN, and from

the denial of a motion to make the Travelers Insurance Company a party to the action and to compel the Travelers Insurance Company to sue, in its own behalf and as trustee for libelant, for injuries sustained by libelant when employed as a longshoreman loading the SS HOEGH SILVERCLOUD. The libel was dismissed, and the motion to make the Travelers Insurance Company a party was denied, because Czaplicki had previously accepted compensation under the Longshoremen & Harbor Workers Act, 33 U. S. C. Section 933(b). AFFIRMED.

NATHAN BAKER (*Proctor for libelant*, Baker, Garber & Chazen, of counsel); Bernard Chazen, on the brief.

GALLI & LOCKER (Patrick E. Gibbons, of counsel), *proctors for respondent*.

The libelant is a longshoreman formerly in the employ of the Northern Dock Company. While loading the SS HOEGH SILVERCLOUD at a Hoboken pier, he was injured by the collapse of steps built by carpenters in the employ of the Hamilton Marine Contracting Company. Both the Northern Dock Company and the Hamilton Marine Contracting Company were insured against liability by the Travelers Insurance Company.

Three months after the accident, the libelant visited the offices of the Travelers Company and several days later the offices of the United States Employees Compensation Commission, and discussed with them the methods available to him to receive compensation for his injury. At the office of the Compensation Commission he was explained the applicable sections of the Longshoremen's and Harbor Workers Act, 33 U. S. C. 901 *et seq.*, which provides that a longshoreman may file a claim for compensation for injuries with the Commission (Sec. 919), that the deputy commissioner shall reject the claim or award com-

pensation in respect of it (Sec. 919(c)), that acceptance of award of compensation shall operate as an assignment to the employer of all rights to recover damages against any third person responsible for the injury, Sec. 933(b), that the employer may either institute proceedings against the third person or compromise without formal proceedings, Sec. 933(d), that the amount recovered from the third person shall be retained by the employer up to the amount paid out under the award of compensation, and any excess paid to the injured party, Sec. 933(e), and that if the employer is insured and the insurance company has paid the award of compensation, the insurance company shall be subrogated to all of the employer's rights under the statute, Sec. 933(i).

Czaplicki stated that he wished to receive the statutory award of compensation. A formal award of $16,072 was then made, and this amount was paid to him by the Travelers Insurance Company, insurers of Czaplicki's employer, to whose rights they were subrogated. The Insurance Company never brought suit against the third person, the Hamilton Marine Contracting Company, for whom they were also insurers.

Seven years later, in 1952, the libelant instituted the present action against the Hamilton Company, the vessel, and Oivind Lorentzen and the Kerr Steamship Company, Inc., owners and operators of the vessel. The Kerr Company excepted, partially on the grounds that libelant, by accepting the award of compensation, had waived his rights in the matter and was no longer a proper party to bring suit. Judge Sugarman dismissed the libel as to the Kerr Company on those grounds. Libelant then moved to strike one of Hamilton's defenses—that by virtue of his election he was no longer a proper party to bring suit—and further moved to add the Travelers Insurance Company as a party-plaintiff or to order Travelers to

assign its cause of action in the matter to the libelant. Judge Goddard denied the motion in all respects on the grounds that, in the absence of fraud, the assignment was absolute. Judge Ryan then held a hearing and dismissed the libel as to the other parties on the authority of Judge Sugarman's earlier decision. Libelant has appealed.

FRANK, *Circuit Judge*:

1. When an injured party elects to receive an award of compensation under the terms of the Longshoremen's and Harbor-Workers' Compensation Act, the election operates as an assignment to his employer or his employer's insurer, of his right of action against third persons who may have caused the injury. Hunt v. Bank Line, 35 F. (2d) 136 (C. A. 4). The injured party is not without a financial interest in subsequent proceedings, however, for if the assignee recovers from the third person any amount in excess of the award of compensation, that excess goes to the injured party. Libelant argues that, because of this financial interest in the potential recovery from the third person, he is, in effect, a beneficiary, and the assignee is, in effect, a trustee who holds a right in action in trust for the injured party. He cites the following words of Judge Learned Hand written in respect of the statute as to compromises between assignee and tortfeasor: " . . . although it is true that, by accepting compensation, the employee assigns his claim against the tortfeasor to the employer or insurer, the assignee holds it for the benefit of the employee so far as it is not necessary for his own recoupment. The assignee is in effect a trustee and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest." United States Fidelity & Guaranty Co. v. United States, 152 F. (2d) 46, 48 (C. A. 2).

The contention may be said to have particular force where, as in the instant case, the assignee is not in the ordinary position of adverse interest to the third party, but is an insurer who has a common interest with the third party because he has also insured that party.

We do not, however, need to decide this issue; for, on account of his laches, libelant has surely lost whatever interest he may once have had in recovery from the third party. Whether the statute of limitations of New Jersey, where the libelant resides and where the accident occurred, or the statute of limitations of New York, where suit was brought, is our guide, the time has long since passed when the assignee might have recovered against the alleged tort-feasor.

2. Libelant contends, in the alternative, that no legitimate award of compensation was ever made because of alleged procedural defects in the compensation proceedings. But the statute allows direct judicial review of an award, 33 U. S. C. §921, and that section provides the exclusive method of securing judicial relief. Even assuming, however, that an award may be thus collaterally attacked, libelant's allegation of error is without merit. He alleges that the deputy commissioner did not literally comply with the procedural requirement that he either hold a hearing on the claim or make an award without a hearing after twenty days has expired since service on the employer of notice of the claim. 33 U. S. C. §919. In the instant case, there was no hearing nor was a hearing requested. Admittedly, the deputy commissioner did not wait until twenty days had expired after notice to the employer. But that requirement is solely for the benefit of the employer by allowing him sufficient time to prepare a defense, if any, to the claim.

AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of May one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. WILLIAM L. HASTIE,
Circuit Judges.

BLAZEY CZAPLICKI,
Libelant-Appellant,

—v.—

s/s HOEGH SILVERCLOUD, etc.,
Respondent,

OLIVAND LORENTZEN, as Director, etc., *et al.*,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the So thern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

/s/ A. Daniel Fusaro
Clerk

Per Curiam Opinion on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BŁAŻEY CZAPLICKI,

Libelant-Appellant,

—v.—

The vessel "SS HOEGH SILVERCLOUD," her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of The Norwegian Shipping and Trade Mission, Kerr Steamship Company, Inc., and Hamilton Marine Contracting Company, Inc.,

Respondents.

Before:

CLARK, *Chief Judge* and
FRANK and HASTIE, *Circuit Judges.*

On Petition for Rehearing.

NATHAN BAKER, Hoboken, N. J. (Baker, Garber & Chazen and Bernard Chazen, Hoboken, N. J., on the brief), *for libelant-appellant.*

PER CURIAM:

Petition for rehearing denied.

C. E. C.
J. N. F.
W. H. H.
C.J.J.

Filed: June 14, 1955

Order on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of June, one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. JEROME N. FRANK,
HON. WILLIAM H. HASTIE,
Circuit Judges.

BLAZEY CZAPLICKI,
Libellant-Appellant,

—v.—

S.S. HOEGH SILVERCLOUD, her engines, etc.,
Respondent,

OLIVAND LORENTZEN, as Director, etc.,
Respondents-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO